Nos. 89-762
89-776

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In the Supreme Court of the United States

OCTOBER TERM, 1989

SANDRA DURANT, Personally and on Behalf of the Heirs at Law of CHARLES N. DURANT, DECEASED, and SANDRA DURANT, as Administratrix of the Estate of CHARLES N. DURANT, DECEASED, and JAMES E. TASSIN,
Respondents,

vs.

JAMES NENEMAN,
Petitioner.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 28, 1989

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QUESTIONS PRESENTED FOR REVIEW

The respondents assert that a Writ of Certiorari should not be issued because the United States Court of Appeals for the Tenth Circuit entered a judgment in this proceeding which was based upon a correct decision on the following issue: Whether or not the Tenth Circuit Court of Appeals properly applied the *Feres Doctrine* to the facts presented in this case?

RELATED CASES

For some reason petitioner has filed separate Petitions for Certiorari, *Durant, et al. v. Neneman* (No. 776) and *Tassin v. Neneman* (No. 762). The cases have identical issues and facts and were decided in one opinion both in the District Court and in the Tenth Circuit. Respondents are therefore filing only one Brief in Opposition to the petitioner's two Petitions.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were Petitioner James Neneman and Respondents James E. Tassin, Sandra Durant, Personally and on behalf of the Heirs of Charles N. Durant, Deceased, and Sandra Durant, Administratrix of the Estate of Charles N. Durant, Deceased.

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The original opinion of the Court of Appeals is reproduced in the appendix of the petitioner's Petition for a Writ of Certiorari. In regard to the decision of the Tenth Circuit Court of Appeals the respondents would ask this court to take note of Page A-17 thereof in petitioner's Petition for a Writ of Certiorari. On Page A-17 there appears an error in transcription beginning with the second sentence of the page which reads:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*"

In fact, the sentence should read:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should *not* be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*" (Emphasis supplied) (See 884 F. 2d 1350 at 1354).

With the changes as stated herein and where reference to the opinion of the Tenth Circuit Court of Appeals is necessary in this Brief, citation is made to the appropriate page of the appendix to petitioner's Brief.

STATEMENT OF CASE

Respondents filed suit against petitioner in the United States District Court for the District of Kansas for monetary damages arising out of the negligence of the petitioner. Petitioner answered by filing a motion to dismiss for failure to state a claim upon which relief may be granted. Petitioner alleged that he was immune from suit under the *Feres Doctrine.* The District Court granted the relief sought by petitioner, however, the Tenth Circuit Court of Appeals reversed and remanded for trial.

It is undisputed that on August 10, 1987, petitioner James Neneman was driving his privately owned vehicle down a road known as National Rifle Range Road on Fort Riley, Kansas when he went off the roadway and struck both Durant and Tassin as they were running along the

shoulder of the road. Tassin was injured and Durant was killed. At the time of the accident petitioner Neneman was driving from his private residence in Chapman, Kansas to report for work at Fort Riley, Kansas.

It is undisputed that at the time of the accident petitioner Neneman was not acting within the scope of his employment with the United States Army. Respondents, at the time of the accident, were engaged in physical training on Fort Riley, Kansas.

National Rifle Range Road on Fort Riley, Kansas is a public road which, at the time of the accident, was open to all members of the public.

The United States Army is not of the position that *Feres* applies. It has requested the respondents to pursue recovery against the petitioner and his insurance carrier (USAA) for the cost of medical care provided by the United States Army for the injuries caused by petitioner. (See affidavits and accident report filed of record with the District Court in this proceeding.)

REASONS FOR DENYING PETITION

I. THE FERES DOCTRINE DOES NOT BAR THE FILING OF A LAWSUIT BY ONE SERVICE MEMBER AGAINST ANOTHER WHEN THE SECOND SERVICE MEMBER CAUSES INJURY WHILE ACTING IN HIS PERSONAL OR INDIVIDUAL CAPACITY.

A. The Feres Doctrine Is a Federal Tort Claim Defense. There Is No Federal Tort Claim Unless an Employee of the United States Has Committed a Negligent or Wrongful Act or Omission While Acting Within the Scope of His Employment.

II. MILITARY PERSONNEL, ENGAGED IN DISTINCTLY NON-MILITARY ACTS, ARE ACTING AS CIVILIANS AND ARE THUS SUBJECT TO CIVIL AUTHORITY.

A. Act of Driving to Duty Station Is Not a Military Act Protected Under the Feres Doctrine.

B. Whether or not driving to and from work is an act in the scope of employment is governed by state law.

III. THE SUPREME COURT'S RULING IN FERES WAS NOT INTENDED AS A BAR TO AN ACTION BY ONE SERVICEMAN AGAINST ANOTHER IN MATTERS WHOLLY UNRELATED TO MILITARY AFFAIRS. IF THE FERES DOCTRINE IS APPLIED IN SUCH A MANNER, THEN RESPONDENT RESPECTFULLY REQUESTS THAT FERES V. U.S. (SUPRA) BE OVERRULED.

IV. NEITHER THE FEDERAL EMPLOYEES COMPENSATION ACT, THE VETERANS BENEFIT ACT NOR THE UNIFORM CODE OF MILITARY JUSTICE BAR THIS CLAIM.

ARGUMENTS AND AUTHORITIES

I. THE FERES DOCTRINE DOES NOT BAR THE FILING OF A LAW SUIT BY ONE SERVICE MEMBER AGAINST ANOTHER WHEN THE SECOND SERVICE MEMBER CAUSES INJURY WHILE ACTING IN HIS PERSONAL OR INDIVIDUAL CAPACITY.

A. The Feres Doctrine Is a Federal Tort Claim Defense. There Is No Federal Tort Claim Unless an Employee of the United States Has Committed a Negligent or Wrongful Act or Omission While Acting Within the Scope of His Employment.

The immunity established in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 2d 152 (1950) attaches only when an action has been brought against the government under the Federal Tort Claims Act or when conditions justify immunity for a military actor. Liability for non-military conduct by military personnel should not be shielded by the Feres Doctrine.

The petitioner in his reasons for granting the Writ relies in a large part upon the decision of the Tenth Circuit Court of Appeals in *Shaw v. U.S.*, 854 F. 2d 360 (10th Cir. 1988). The distinguishing factor between *Shaw* and the present action is the same distinction which can be found in every case relied upon by the petitioner. Namely, in *Shaw* there was no doubt whatsoever that the soldier committing the wrongful act was doing so while in the "scope of his employment" with the United States of America. In the particular circumstances of the *Shaw* case the employee of the United States who allegedly committed the wrongful act was none other than an army soldier who was operating a vehicle owned by the United States Army at the time of the alleged wrongful act. The Tenth Circuit,

who decided *Shaw*, distinguished the same in the instant case by stating,

> "We distinguish this case from *Shaw* where we held that an injury sustained while driving to one's place of duty was an injury incident to military service. *Shaw* is a classic *Feres* case which applies the strict rationales *Feres* mandates. As we have already noted, intra-military actions giving rise to the issue of military immunity are judged by different standards."

Durant v. Neneman, 884 F. 2d 1350 (1989) at 1354, FN 5.

The petitioner also relies upon *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987). The Tenth Circuit found the trial court's reliance upon the Johnson principle "incorrect". (*Durant v. Neneman*, supra at 1352). The petitioner herein asked this court to extend the ruling in *United States v. Johnson* in a manner in which this court could never have intended. *Johnson* concerned a federal tort claim made by a surviving widow of the serviceman who was killed due to the alleged negligence of a federal employee while the federal employee was engaged in his duties as an employee of the Federal Aviation Administration (FAA). *Johnson* simply extended the bar of the Feres Doctrine to include not only military personnel, but any civilian employee of the United States of America. *Johnson* provides that if there is a factual basis to support a federal tort clai n then the activities of the alleged tortfeasor are irrelevant for the purposes of consideration of a *Feres* Doctrine defense. Johnson does *not* state that the *Feres* Doctrine bars a service member who was injured while engaged in a military related activity from suing another service member for negligently causing the injury when the tortfeasor is *not* acting within the scope of his employment or is engaging in non-military conduct. Reliance upon *Johnson* by the petitioner is misfounded and misapplied to the facts of the instant case.

The petitioner has further relied upon *U.S. v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). In that case this court held that a service member may not maintain a *Bivens* (*Bivens v. Six Unknown Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)) type action for the conduct of other service members in the course of their duties as officers and agents of the United States. There is no allegation, nor is there any basis for an allegation, in the instant proceeding that the petitioner caused injury to the respondents while the petitioner was engaged in the course of his duties as an officer or agent of the United States. Again, the petitioner is attempting to misapply the Feres Doctrine by encouraging this court to turn itself "inside out" and rule that even though there is no basis for a federal torts claim act (because the negligent party was not acting in the "scope of his employment") that somehow *Feres* applies because the injured parties (Durant and Tassin) were acting "incident to service" when they were run down by the petitioner.

The petitioner herein has attempted to convince this court that there exists a conflict among the circuits based upon ten cited cases:

1. *Welch v. United States*, 446 F. Supp. 75 (D. Conn. 1978). In *Welch* the plaintiff was struck by a navy vehicle and sued the United States of America for damages. The individual operating the navy vehicle was unquestionably acting within the scope of his employment when he struck and killed Welch, the plaintiff. This case is inapposite to the facts in the instant case.

2. In *Millang v. United States*, 817 F. 2d 533 (9th Cir. 1987) the plaintiff, while off duty, was run over by an on duty military policeman driving a military police vehicle. Once again, the allegedly negligent person was indisputably acting within the scope of his employment as a

military policeman when he ran over Millang thus making the case factually distinguishable from this case.

3. *McVan v. Bolco Athletic Co.*, 600 F. Supp. 375 (E.D. Pa. 1984). In *McVan* the plaintiff sued Bolco for injuries allegedly caused by a defectively designed base used in a softball game. The base was owned by the United States. Bolco then filed a third party complaint against the United States for negligence by the United States Army. The United States moved to dismiss the third party complaint premised on the Feres Doctrine. The court held that the third party complaint against the United States was barred by *Feres* because the plaintiff could not sue the United States for alleged negligence in the design or inspection of the base or in the organization of the softball game because at the time plaintiff was injured he was engaged in a military activity and thus he could not sue the United States of America under the Federal Tort Claims Act pursuant to the Feres Doctrine. It is important that this ruling did not affect the action of the plaintiff, McVan, against Bolco even though the plaintiff was engaged in a military activity when injured. The status of the plaintiff did not render Bolco immune from suit because Bolco was not an agent of the United States (just as Neneman was not an agent of the United States in the context of the instant case).

4. In *Chambers v. United States*, 357 F. 2d 224 (8th Cir. 1966) the plaintiff was injured in a swimming pool owned and operated by the United States. Again, the scope of employment was not an issue. The liability of the United States, if any, was either direct or by respondent superior. It was unquestioned in *Chambers* that the elements of 28 U.S.C., Sec. 1346(b) were satisfied. The injury was caused by the alleged negligence or wrongful act or omission of an employee of the government while acting

within the scope of his employment. If this section had not been satisfied, then the considerations of *Feres* need never have been mentioned. The case, again, is totally inapposite to the facts in the instant case.

5. In *Knight v. United States*, 361 F. Supp. 708 (W.D. Tenn. 1972) the plaintiff again sought compensation for a drowning by a service member in a swimming pool owned and operated by the United States of America. The facts and holding of Knight are inapplicable to the instant case for the same reasons as cited above in *Chambers*.

6. In *Degentesh v. United States*, 230 F. Supp. 763 (N.D. Ill. 1964) the plaintiff sued for injuries that were caused by an employee of the United States while the employee was driving a vehicle owned by the United States Navy. The negligent individual was acting within the scope of his employment. Accordingly the question of plaintiff's activities became relevant and material.

7. In *Keisel v. Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970) the plaintiff was denied the right to sue the United States upon the same grounds as cited in *McVan v. Bolco*, supra. The original suit against Buckeye Donkey Ball, Inc. was not dismissed. Even though Keisel was engaged in a military activity at the time of his injury Buckeye was not acting within the scope of employment by the United States. Thus, while the case against the United States was dismissed the case against Buckeye Donkey Ball, Inc. was not.

8. In *Nagy v. United States*, 471 F. Supp. 383 (D.C. Cir. 1979). In *Nagy* the plaintiff sought to sue the United States and certain federal officials for negligence and constitutional villations. The court reiterated *Feres* and applied it to the constitutional violations as well. In *Nagy* it was uncontroverted that the individual defendants acted in their official capacity as employees of the United States

when allegedly violating Nagy's constitutional rights. Thus, the case is not applicable to the facts in the instant case.

9. In *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 2d 139 (1954) the court held that the plaintiff was entitled to pursue a federal tort claim for injuries caused by medical malpractice sustained in a Veterans Administration Hospital after Brown had been discharged from the armed services. The case does not support the petitioner's position in the instant case as it does not address facts even remotely similar to those at hand.

10. The cases cited by petitioner dealing with an attempt to circumvent the Feres Doctrine by not naming the United States, namely *Gaspard v. United States*, 544 F. Supp. 55 (E.D. La. 1982); *Jaffee v. United States*, 663 F. 2d 1226 (3rd Cir. 1981) and *Bois v. Marsh*, 801 F. 2d 462 (D.C. Cir. 1986) do not apply to the facts of the instant case. In each of those cases the plaintiffs were attempting to circumvent the Federal Tort Claims Act by naming an individual employee of the government who was indisputably acting within the scope of his or her employment at the time of the wrongful act or omission. In the instant case it is undisputed that Neneman was not acting within the scope of his employment and thus the government could never have been responsible for his acts no matter who he would have run over; be it a sergeant in the United States Army or a civilian.

As the Tenth Circuit Court of Appeals stated in its opinion:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*"

Durant v. Neneman, supra at 1353. Later the Tenth Circuit in the same case stated:

> "Yet if one focuses on the military purpose or mission of the defendant's conduct precipitating plaintiff's claim in the context of a need to protect military integrity, harmony, or authority, one must decide the mere act of driving to work, without more, is not the performance of a military act."

(*Durant v. Neneman*, supra, at 1354.)

II. MILITARY PERSONNEL, ENGAGED IN DISTINCTLY NON-MILITARY ACTS ARE ACTING AS CIVILIANS AND ARE SUBJECT TO CIVIL AUTHORITY.

A. The Act of Driving to a Duty Station Is Not a Military Act Protected Under the Feres Doctrine.

In the instant case the Court of Appeals analyzed the rationale behind the Feres Doctrine and properly applies the *Feres* progeny to the facts in the instant case. They found that the instant case is not a "true Feres" case wherein liability is asserted by a serviceman against military actors for acts committed within the scope of their employment with the military service. Rather, they held that the instant case is a "intra-military" case which is an outgrowth of the *Feres* rationale. Thus, they found that the court must examine the case factually to determine whether or not allowing the civil lawsuit to proceed would involve the court "delving into military matters and calling to bar military decisions and institutions". (Citing *Chappel v. Wallace*, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983) and circuit court cases which similarly granted immunity to persons whose military authority is the basis for a plaintiff's claim of liability. *Miller v. Newbauer*, 862

F. 2d 777 (9th Cir. 1988); *Bois v. Marsh*, 801 F. 2d 462 (D.C. Cir. 1986 and *Trerice v. Summons*, 755 F. 2d 1081 (4th Cir. 1985).

The Tenth Circuit Court then carefully examined those cases which extended intra-military immunity to persons not actually supervising the plaintiff, "but nonetheless exercising military responsibility". Citing *Stauber v. Cline*, 837 F. 2d 395 (9th Cir.), Cert. denied, 109 S. Ct. 55 (1988); *Haas v. United States*, 518 F. 2d 1138 (4th Cir. 1975) and *Mattos v. United States*, 412 F. 2d 793 (9th Cir. 1969). Thus, the Circuit Court reviewed this case to determine whether or not the zone of protection under the "intra-military immunity" provisions of *Feres* and its progeny was intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military.

The facts of the instant case reveal that the petitioner, Lt. Neneman, was driving his privately owned vehicle upon a public roadway in the Fort Riley Military Reservation. He was doing nothing which could be determined as military in nature. He was making no military or command decision and was not engaged in a military act. As the Circuit Court noted, petitioner should not be allowed to escape responsibility for his act. As the Circuit Court aptly points out, the issue in this case devolves into whether or not the act of the petitioner in driving to his duty station was a military act. The Circuit Court properly answered the question in the negative.

B. Whether or Not Driving to and From Work is an Act in the Scope of Employment Is Governed by State Law.

In *Williams v. United States*, 350 U.S. 857, 77 L. Ed. 2d 372 (1955) this court ruled that whether or not a soldier

is "acting within the scope of his official employment" is not controlled by federal law, but rather by the law in the state wherein the incident occurred. *Patton v. United States*, 311 F. 2d 604 (10th Cir. 1962); *Cooner v. United States*, 276 F. 2d 220 (4th Cir. 1960). The Kansas Supreme Court has repeatedly held that an individual traveling to and from work is not acting within the scope of his employment. (*Pearson v. Electric Service Co.*, 166 Kan. 300, 201 P. 2d 643 (1949); *Abbott v. Southwest Grain Co.*, 162 Kan. 315, 176 P. 2d 839 (1947); *Brinkley v. Farmers Elevator Mutual Ins. Co.*, 485 F. 2d 1283 (10th Cir. 1973)).

Every court that has considered the question has held that when a service member is proceeding from his home or some other non-duty related place to his place of duty or from his place of duty to his home or some other non-duty related place, the service member is not acting within the scope of his employment and there can be no federal tort claim filed against the government under the theory of respondeat superior (28 U.S.C., Sec. 1346(b)). *Peres v. United States*, 368 F. 2d 320 (1st Cir. 1966); *Bach v. United States*, 92 F. Supp. 715 (New York 1950); *Murphy v. United States*, 113 F. Supp. 345 (New York 1953); *Moye v. United States*, 117 F. Supp. 236 (Texas 1954); *Driscoll v. Harmon*, 124 Ariz. 15, 601 P. 2d 1051 (1979); *U.S. v. Eleazer*, 177 F. 2d 914 (4th Cir. 1949); *Proietti v. Levi*, 530 F. 2d 836 (9th Cir. 1976).

The Tenth Circuit, in the instant case, relied in a large part on the case of *Brown v. United States*, 739 F. 2d 362 (8th Cir. 1984), Cert. denied, 473 U.S. 904 (1985). In *Brown* the court focused upon the nature of defendant's conduct in determining whether "intra-military immunity" would be granted. The court in *Brown* correctly ruled that the activity of the defendants was one which was "distinctly non-military in nature". The court held that a

group of soldiers involved in a mock lynching of a young black man implicated neither the institution of the military itself nor the exercise of command authority. They ruled that a common law civil action would lie against the individual defendants, but not against the United States of America under the Federal Tort Claims Act. In this case Neneman's actions reflect only upon himself and do not implicate the military in any way.

III. THE SUPREME COURT'S RULING IN FERES WAS NOT INTENDED AS A BAR TO AN ACTION BY ONE SERVICEMAN AGAINST ANOTHER IN MATTERS WHOLLY UNRELATED TO MILITARY AFFAIRS. IF THE FERES DOCTRINE IS APPLIED IN SUCH A MANNER, THEN RESPONDENT RESPECTFULLY REQUESTS THAT FERES V. U.S. (SUPRA) BE OVERRULED.

The Federal Tort Claims Act by the express terms of its language allows recovery for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting *within the scope of his office or employment* . . .".[1]

It is the respondent's position that inasmuch as the Federal Tort Claims Act could never apply to the facts of

1. 28 U.S.C. § 1346(b). Subject to the provisions of Chapter 171 of this title (28 U.S.C., § 2671, et seq.) the district courts, together with the United States Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction in civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government *while acting within the scope of his office or employment*, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (Emphasis supplied).

the instant case and, since the *Feres* Doctrine is only a defense to a Federal Tort Claims Act case, then the Feres Doctrine and its progeny could never apply to bar suit by the respondent against the petitioner.

Petitioner is attempting to convince the court that, in essence, the passage of the Federal Tort Claims Act somehow took away the respondent's ability to file a common law action against the petitioner. Prior to the passage of the Federal Tort Claims Act and before the cases interpreting the act (among those *Feres*), there would have been little doubt that a common law action would lie by a soldier against another soldier who injured him while driving to work under circumstances wholly unrelated to military discipline or orders.

We would venture to state that there are probably now pending and have been decided in the various state and federal courts in this country hundreds, if not thousands, of cases involving two members of the military involved in an automobile accident (on the base or off the base) where in the "Feres Doctrine" was never raised as a defense because it was either illogical to assume that a private actor just by virtue of being in the army could escape liability or the defense attorneys simply were not as resourceful as in the instant case. Therefore, we grant to the petitioner and his attorneys their resourcefulness.

As the Tenth Circuit Court of Appeals so aptly points out, "the immunity established in *Feres* attaches only when an action has been brought against the government under the Federal Tort Claims Act". We do not believe that Congress ever intended to shield military personnel from common law actions based on their non-military conduct and if this court were to find some compelling reason to so rule, then we respectfully request that this court over-

rule *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 2d 152 (1950).

In *Brooks v. United States,* 337 U.S. 49, 93 L. Ed. 1200, 69 S. Ct. 918 (1949) the court was faced with an accident involving a government vehicle and a soldier who was off duty and on leave at the time of the incident. In *Brooks* this court found that it could not infer that Congress intended to bar all suits by servicemen particularly in view of the fact that Congress did not exclude servicemen from application of the act during its passage in 1946. In 1950 the *Feres* case came before this court and this court ruled that a soldier could not recover *under the Federal Tort Claims Act* for injuries that arise out of or are in the course of activity "incident to service".

As Justice Scalia aptly noted in his dissent in *U.S. v. Johnson,* 481 U.S. 681, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (1987)

> "Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the Feres Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the Feres Rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended."

Justice Scalia went on to say:

> "In sum, neither the three original Feres reasons nor the post hoc rationalization of 'military discipline' justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the 'widespread, almost universal criticism it has received."

Because the Federal Tort Claims Act did not exempt certain claims brought by servicemen against other servicemen and because of the reasons as enumerated in the dissent of Justice Scalia in *U.S. v. Johnson* (supra), we respectfully request that the court overrule *Feres v. United States* (supra).

IV. NEITHER THE FEDERAL EMPLOYEES COMPENSATION ACT, THE VETERANS BENEFIT ACT NOR THE UNIFORM CODE OF MILITARY JUSTICE BAR THIS CLAIM.

The petitioner continues to argue to the court that somehow the Federal Employees Compensation Act (FECA), 5 U.S.C., § 8101, et seq. and the Veterans Benefit Act (FBA), 38 U.S.C., § 301, et seq. somehow apply this case. The FECA does not apply to members of the military. It is strictly a system of compensation for civilian employees of the United States of America and thus has no application to the instant case (5 U.S.C., § 8101(1)). *Sims Motor Transportation Lines, Inc. v. Foster,* 293 S.W. 2d 226 (Ky. 1956). Further, in *Vantrease v. U.S.,* 400 F. 2d 853 (5th Cir. 1968) and *Skrocki v. Butler,* 324 F. Supp. 1042 (Mich. 1971) the courts held that under the FECA government employees have the right to pursue tort actions against a government employee who negligently causes injury while acting outside of the scope of his employment; and the United States retains the right of subrogation to collect from a negligent third party moneys paid to an employee for injuries caused by the negligent third party (5 U.S.C., § 8131 (1987)).

As to the Veterans Benefit Act (38 U.S.C., § 301, et seq.), defendant has cited no case law and there is no case law which holds that a tortfeasor acting in his individual capacity and not as an agent of the United States is to be

granted immunity from liability in a civil suit merely because the deceased party fortuitously had contracted to obtain some form of disability compensation.

Finally, the petitioner in his brief has raised the Uniform Code of Military Justice (UCMJ) and the fact that the military authorities proceeded against petitioner to somehow be controlling as to whether or not the petitioner was acting within the scope of his employment. Jurisdiction under the Uniform Code of Military Justice (UCMJ) and a determination of "scope of employment" are completely separate and unique considerations. The case of *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 30, 97 L. Ed. 2d 364, rehearing denied, 483 U.S. 1056 (1987) is directly on point with the issue despite the fact that the *Solorio* opinion does not contain the word "Feres". *Solorio* states that a service member is constantly subject to the jurisdiction of the Uniform Code of Military Justice even though he may be acting outside of the scope of his employment at the time of an alleged infraction. Thus, the petitioner's reliance upon the UCMJ is wholly unfounded in these circumstances.

CONCLUSION

The Tenth Circuit Court of Appeals reviewed the applicable law of *Feres* and its progeny and applied the facts to the instant case. Its opinion is well reasoned and correct. The United States of America, via the U. S. Attorney, has not asked to be substituted for the petitioner (as is usually the case when the United States feels there may be some government action involved). What this case really involves is an insurance company for the petitioner attempting to cut its losses by collecting premiums without incurring responsibility for payment of damages caused by the negligence of its insured. This is important for the insurance company of the petitioner (USAA) who insures mainly officers in the military of the United States.

For the reasons as stated in this Brief respondents respectfully submit that the ruling of the Tenth Circuit Court of Appeals was correct and should be allowed to stand. In the alternative, respondents respectfully suggest that *Feres v. United States* was wrongly decided and does not reflect the intent of Congress and should be overruled.

Respectfully submitted,

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